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No. 82-445

In the Supreme Court of the United States

OCTOBER TERM, 1982

HAIM MIZRAHI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the petitioner was denied the effective assistance of counsel at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1982 (Pet. App. A-1). The petition for a writ of certiorari was filed on September 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of procuring naturalization contrary to law, in violation of 18 U.S.C. 1425(a). He was sentenced to a term of imprisonment for a year and a day, all but six months of

which was suspended, fined $5,000, and placed on probation for three years (Tr. 615-616). In addition, petitioner's citizenship was revoked (Tr. 615, 619). The court of appeals affirmed (Pet. App. A-1 to A-3).

1. Petitioner was born on July 12, 1930, in Tel Aviv, Israel, of parents who were not United States citizens (Exh. 3). While living there, petitioner was convicted eight times by Israeli courts of criminal offenses, including assault and theft, between 1945 and 1965 (Exh. 1). Petitioner entered the United States on July 4, 1967 as a visitor for pleasure; he subsequently became a permanent resident alien and then a citizen (Exhs. 3 and 4).

As the trial evidence showed, in the course of changing his status to that of a permanent resident and later in becoming a citizen, petitioner falsely denied four times under oath that he had a criminal record. Thus, petitioner indicated on his application to adjust his status to that of a permanent resident alien, which was sworn and signed April 8, 1968, that he had not been charged with a violation of law other than minor traffic violations (Tr. 188; Exh. 3). Petitioner subsequently swore to the accuracy of this application in his June 17, 1968 interview before an immigration examiner (Tr. 178, 185, 188, 197). Several years later, after being granted permanent resident status, petitioner filed an Application to File Petition for Naturalization on January 15, 1974 (Exh. 4). In that application, petitioner swore, first, that he had not "knowingly committed any crime" for which he had not been arrested and, second, that he had not "been arrested, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance, including traffic regulations," although he did list four traffic citations (Tr. 238-240; Exh. 4). During a sworn interview concerning the application, the interviewer changed the answer to the second part of the question to "Yes" in view of petitioner's admission of the traffic offenses. However, the

interviewer noted that after further questioning, petitioner said he had not been arrested for any other offenses (Tr. 237, 239-240, 295).

In order to establish petitioner's criminal history, the government introduced at trial a document containing a list of the final convictions, the Israeli court in which petitioner was convicted, and the date of trial and nature of sentence in each of eight cases from July 27, 1945 through July 9, 1965 (Exh. 1). Captioned "Headquarters, Interpol, Criminal Intelligence Division," the document was certified by an official of the Israeli Department of Automatic Data Processing to be the final convictions on petitioner's criminal record number 5906/45. Attached to the list of convictions was a photographic copy of fingerprints similarly certified to be the fingerprints of the person with criminal record number 5906/45. The list of convictions was further certified under seal by R. Sivan, Director of the Consular Division of the Israeli Ministry of Foreign Affairs, whose signature and seal were, in turn, certified by Susan S. Jacobs, United States Consul for the Consular District of Tel Aviv/-Jaffa, Israel.

INS Investigator Nowlon testified that he had received these documents as a result of a request to the Israeli National Police made through INS' Interpol liaison officer. He also testified that he took petitioner's fingerprints on February 4, 1981 (Tr. 153). A subsequent comparison of the fingerprints taken by Nowlon and the fingerprints received from Israel established that the two sets of fingerprints belonged to the same person (Tr. 154-155, 172). The fingerprints and record of convictions were admitted into evidence without objection by petitioner's counsel (Tr. 172).

With the exception of the 1954 conviction for theft, petitioner admitted at trial the accuracy of the record of convictions (Tr. 419-422, 429). He maintained, however,

that he did not understand English well and that he misunderstood the questions posed to him orally and in writing concerning his criminal history. In particular, petitioner testified that he thought the criminal history questions referred only to whether he had ever been "arrested" for an offense, and that he had only been sent letters to appear in court and had not been "arrested" before 1974 (Tr. 406-407, 410, 415-421).

ARGUMENT

Petitioner contends that he was denied effective assistance of counsel because his attorney failed to object to the admission of the Israeli record of his convictions and failed to object to the prosecution of petitioner under 18 U.S.C. 1425(a). These claims of ineffective assistance of counsel, based on the particular facts of this case, do not warrant review by this Court. The court of appeals applied an appropriate standard for review of ineffective assistance of counsel claims and correctly concluded that there is no indication that petitioner's counsel "failed to exercise the skill, judgment, and diligence of a reasonably competent attorney" (Pet. App. A-2).

1. The document listing petitioner's prior convictions in Israel constituted a "public record [or] report" within the meaning of Fed. R. Evid. 803(8), and further met the authentication requirements for a foreign public document under Fed. R. Evid. 901 and 902(3). Contrary to petitioner's contention (Pet. 9-23), the record therefore clearly was admissible at trial. Accordingly, counsel cannot be thought to have been ineffective in failing to object to its admission. But even if the issue were fairly debatable, counsel, at the very least, reasonably could have concluded that the trial court would have admitted the record of convictions even if

he had objected,[1] or that, if the trial court did not do so, the government would have offered other evidence to establish the existence and validity of the criminal records.

As this Court said in *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), in assessing the competency of counsel who advised the defendant to plead guilty rather than challenge the admissibility of an allegedly coerced confession:

> Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

See also *Engle* v. *Isaac*, No. 80-1430 (Apr. 5, 1982), slip op. 25. So here, the decision not to challenge the admissibility of the record of convictions — all but one of which petitioner admitted at trial in any event — but rather to offer a defense that petitioner did not understand the meaning

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[1] Petitioner erroneously refers to the Israeli record of convictions as a "rap sheet," and then cites cases involving rap sheets to support his claim that the instant document should not have been admitted (Pet. 14-15). The record of convictions, while maintained by the Israeli National Police, is far different from a "rap sheet." It is a record *only* of convictions, not of charges and arrests. It is made as the official Israeli record of convictions and is admissible under Section 170 of the Israeli Criminal Procedure Law as prima facie evidence of previous convictions. The document, fully authenticated as required by the Rules of Evidence, therefore was admissible in this case. See *United States* v. *Regner*, 677 F. 2d 754, 758-759 (9th Cir. 1982); *United States* v. *Leal*, 509 F. 2d 122, 125-128 (9th Cir. 1975); *Lloyd* v. *American Export Lines, Inc.*, 580 F. 2d 1179, 1187-1190 (3d Cir.), cert. denied, 439 U.S. 969 (1978).

of questions concerning his criminal history, constituted "advice * * * within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson, supra*, 397 U.S. at 771, 774. Under no reasonable view can it be said to involve "serious derelictions" on the part of counsel (*ibid.*).

2. The court of appeals also correctly rejected petitioner's contention (Pet. 23-36) that trial counsel's assistance was constitutionally inadequate because he failed to object to the prosecution of petitioner under 18 U.S.C. 1425(a), which makes criminal the procurement of naturalization "contrary to law." Petitioner contends that his making of a false statement on his Application to File Petition for Naturalization could have been prosecuted only under 18 U.S.C. 1015(a), which prohibits the making of a false statement under oath in any matter relating to naturalization, citizenship, or registration of aliens, or possibly under 18 U.S.C. 1001, the general false statement statute. As this Court has made clear, however, where there is an overlap in the coverage of two criminal statues, the government may prosecute under either. *United States* v. *Batchelder*, 442 U.S. 114 (1979).

We agree with petitioner that the making of the concededly false statements in connection with his naturalization was prohibited by 18 U.S.C. 1015(a). But this does not mean that his conduct in this case was not also reached by 18 U.S.C. 1425(a). Petitioner did more in this case than make a false statement; he obtained his citizenship as a result. Because he procured naturalization through the making of a false statement that in itself constituted a criminal violation and was therefore contrary to law, he procured his naturalization "contrary to law" within the meaning of 18 U.S.C. 1425(a). See *United States* v. *Bruno*, 25 F. Supp. 793, 794 (D.N.J. 1938). Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 514-515 (1981); *Baumgartner* v. *United States*, 322 U.S. 665, 675 (1944).

Petitioner concedes (Pet. 26, 31) that the obtaining of naturalization through the making of a false statement in connection with an application for naturalization would be prohibited by 18 U.S.C. 1425(a) as "contrary to law" if the false statement related to one of the statutory criteria for naturalization; but he contends that the false statement here does not fall in that category. Petitioner is wrong. Under 8 U.S.C. 1427(a) and 1429, an applicant for citizenship must have been lawfully admitted for permanent residence. *Fedorenko* v. *United States, supra*, 449 U.S. at 514-515. The commission of crimes involving moral turpitude renders an alien ineligible to receive an immigrant visa, 8 U.S.C. 1182(a)(9), and therefore to attain the status of an alien lawfully admitted for permanent residence, 8 U.S.C. 1255(a). The false information on the Application regarding petitioner's convictions in Israel therefore was material to the consideration by the INS and the court of his application for naturalization.[2] Moreover, 8 U.S.C. 1427(a)(3) requires that an applicant for naturalization be a person of good moral character, and 8 U.S.C. 1101(f)(6) precludes such a finding for one who has given false testimony for the purpose of obtaining benefits under the Act, as petitioner did both in his Application to File Petition for Naturalization and in his application for permanent resident status.

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[2]The Attorney General is directed by 8 U.S.C. 1446 to conduct an investigation of the person petitioning for naturalization, including a personal examination of the person to determine his eligibility for citizenship, and to submit a recommendation to the naturalization court. The Attorney General also is authorized to promulgate regulations and prescribe forms for this purpose. 8 U.S.C. 1443(a) and (c). The Application to File Petition for Naturalization (Form N-400), involved in this case (Exh. 3), is prescribed by regulation pursuant to this authority, 8 C.F.R. 332a.2, and the material on that Application furnishes the basis for the examination of the person by INS to determine his eligibility for citizenship. 8 C.F.R. 332.11(b). Thus, in failing to answer the question truthfully, petitioner did not comply with the regulatory procedures established pursuant to statute as a prelude to naturalization.

In any event, petitioner acknowledges that he can point to no decision of this Court or any other court holding that the conduct at issue here was not subject to prosecution under 18 U.S.C. 1425(a). At the very least, then, the failure of the attorney who represented him at trial to identify the novel statutory construction urged by petitioner here cannot be thought to have departed so substantially from the range of competence ordinarily expected of an attorney in a criminal case as to render the attorney's performance constitutionally inadequate under the Sixth Amendment. *McMann* v. *Richardson, supra*, 397 U.S. at 771, 774; *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973); see also *Engle* v. *Isaac, supra*, slip op. 25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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